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In the Supreme Court of the United States

October Term, 1973

No. 73-728

CITY OF MIAMI, a municipal corporation,

Petitioner,

vs.

DAVID SPICY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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MIAMI REVIEW — 371-4853 — 377-3721

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In the Supreme Court of the United States

October Term, 1973

NO. _____

CITY OF MIAMI, a
municipal corporation,

Petitioner,

vs.

DAVID SPICY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Florida entered in the above entitled cause on October 3, 1973, finalizing its earlier opinion on Rehearing Granted June 27, 1973.

OPINIONS BELOW

1. The Opinion of the Supreme Court of Florida not yet officially reported, dated October 3, 1973, denying the City of Miami's Petition for Rehearing of its earlier Order, hereto attached, marked Exhibit #1.

2. The Opinion of the Supreme Court of Florida, dated June 27, 1973, and not as yet officially reported, which on Rehearing Granted, reversed the decision of the Third District Court of Appeals, hereto attached, marked Exhibit #2.

3. Opinion of the Third District Court of Appeals dated August 8, 1972, rehearing denied September 19, 1972, and reported at 266 So.2d 101, which directed a verdict for the Defendant, City of Miami, hereto attached, marked Exhibit #3.

STATUTE CONFERRING JURISDICTION

Jurisdiction is conferred by Title 28, U.S. Code, §1257(3), granting certiorari where any right, privilege or immunity is claimed under the Constitution.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The Supreme Court of Florida, by its Opinion denied due process and equal protection of the laws to the City of Miami by holding the City liable for the tort of another.

QUESTION PRESENTED FOR REVIEW

WHETHER THE SUPREME COURT OF FLORIDA DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY ITS DECISION DENYING REHEARING AND ITS DECISION STYLED ON REHEARING GRANTED, HOLDING THE CITY OF MIAMI LEGALLY LIABLE FOR THE TORT OF A THIRD PARTY, I.E. A DADE COUNTY SEPARATE ENTITY HOSPITAL FACILITY.

STATEMENT OF THE CASE

Proceedings Below

The action involved is a survival action for false imprisonment brought by the administrator of an estate. City of Miami police found Decedent in a dazed condition with a head injury. He appeared to be drunk. When coworkers of Decedent refused to take him home, Decedent was placed in custody and sent to Jackson Memorial Hospital for an examination. The arresting officer filled out both an examination report and an arrest report for drunkenness.

The hospital intern who examined Decedent found a negative neurological indication but felt that Decedent "had been drinking to the extent that he had a staggering gait." Decedent admitted to the doctor that he had been drinking.

After the examination, Decedent was released to the Police Department and taken to jail. The next day, his condition worsened, and he was returned to Jackson Memorial Hospital, where he later died. An autopsy report showed a skull fracture and other injuries which caused his death.

On these facts, the Third District Court of Appeals held that reasonable men could not differ that the police officer acted reasonably in arresting the Decedent for the misdemeanor of drunkenness. On the basis, the Court reversed a lower court judgment on a jury verdict in favor of the Plaintiff and ordered that a directed verdict be entered in favor of the City of Miami.

The Supreme Court of Florida, on rehearing granted, overturned the decision of the Third District Court of Appeals and reinstated the trial court judgment in favor of the administrator.

In so deciding, the Supreme Court held that the police based the required "substantial reason to believe the plaintiff was committing a misdemeanor" (public drunkenness) upon the intern's later determination as to whether Decedent was in fact drunk. The Court then held that the officer could not do this but must exercise his own judgment.

A Petition for Rehearing on behalf of the City of Miami was timely filed.

The contention was raised in this Petition for Rehearing that the Supreme Court of Florida violated the right of the City of Miami to due process of law under

the Fourteenth Amendment to the United States Constitution by making the City of Miami responsible for the negligence or fault of a third party.

Pointed out in the Petition was the following:

1. Any false imprisonment was committed by the hospital intern who transferred the Deceased from the hospital to the jail.

2. If the intern found the Decedent neither drunk nor injured, he should have released the Decedent.

3. The police officer merely sent the Deceased to the hospital by ambulance with the instruction to send the Deceased to jail if he was found to be drunk.

The Petition further contended that the Court denied to individual police officers as well as the City of Miami equal protection of the laws and due process of law guaranteed by the United States Constitution because its opinion made police officers responsible for a standard of care which is impossible to perform by requiring the following of police officers:

> (1) Each police officer making an arrest to be a judge of possible latent medical problems; and
>
> (2) Police officers are the guarantors of the life, health and medical safety of arrested persons who may later have medical problems.

Said Petition is attached hereto and marked Exhibit #4.

Thus, the Federal questions presented to this Court for review were raised in the Petition for Rehearing filed on behalf of the City of Miami following the decision and opinion of the Supreme Court of Florida filed June 27, 1973 in which the Court quashed the decision of the Third District Court of Appeal. The substance of the opinion of the Florida Supreme Court generated these Federal constitutional questions.

The Florida Supreme Court passed upon the questions by denying the Petition for Rehearing on October 3, 1973.

As was pointed out to the Florida Supreme Court in the Petition for Rehearing that court made the City of Miami responsible for the negligence of the hospital intern because it was the hospital intern who dispatched the decedent to the City of Miami jail.

Indeed, the quotation of the evidence by the Florida Supreme Court clearly shows that if there were false imprisonment, the false imprisonment was the act of the hospital intern and not the arresting officer.

In Footnote #2 of the opinion of the Supreme Court, the following testimony of the police officer is quoted:

> "A. . . . . If this man was found, through the doctor, to be injured, then the arrest report could be torn up. If, through the doctor, he was found to be drunk, then he could be sent to the station. . . . . I sent him by ambulance (to the Hospital)."

This testimony quoted by the Florida Supreme Court in its opinion makes it clear that all the police officers did was to send the deceased to the hospital **by ambulance.** The instruction of the police officer was to send the decedent to the station **if he was found to be drunk.** Obviously, if he was not found to be drunk he should have been kept in the hospital or released.

Thus, the Florida Supreme Court, by making the City of Miami responsible for the negligence of the hospital intern, has violated the constitutional right of the City of Miami to the protection afforded it by the due process clause of the U. S. Constitution.

The pertinent portion of Amendment XIV to the U. S. Constitution states as follows:

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . ."

Obviously, the Florida Supreme Court in making the City of Miami responsible for the negligence or fault of another has deprived it of property without due process of law.

The Florida Supreme Court, in addition, by its opinion made police officers responsible for an impossible standard of care by requiring police officers in making arrests to be the following:

1. Judges of possible latent medical problems;

2. Guarantors of the life, health and medical safety of arrested persons who may later have medical problems.

This court, in Pierson v. Ray, 386 U.S. 549, 18 L. Ed 2d 288, 87 S.Ct. 1213, held that good faith and probable cause is available to police officers in a common-law action for false arrest and imprisonment as well as being available to them in an action under Section 1983 of Title 42 of the U. S. Code.

In the case of **Hill v. Rowland,** USCA 4th, October 3, 1972, 474 F.2d 1374, 1377, the Fourth Circuit Court of Appeals held in a civil rights action the test of liability for making a warrantless arrest was not an objective test of probable cause but rather a subjective test of the reasonably good faith of officers in the legality of the arrest.

In **Cambist Films, Inc. v. Duggan,** USCA 3rd, March 13, 1973, 475 F.2d 887, the court stated as follows:

> "Police officers are not expected to have a complete knowledge of the intricacies of case law; rather they are only expected to act in accordance with the facts and circumstances of the given situation with which they are confronted."

Thus, both the Supreme Court and the Federal appellate courts held that police officers are held merely to a reasonable standard of care in making arrests on the basis of a partly subjective test.

The opinion of the Florida Supreme Court, therefore, flies directly in the face of these decisions and violates the due process standards which have been established in **Pierson v. Ray, supra.**

CONCLUSION

It is respectfully submitted that it is clearly demonstrated that the Supreme Court of Florida, in its Opinion on Rehearing Granted, has clearly denied due process to the City of Miami by holding it responsible for the tort of a third person, i.e. the Dade County Hospital facility, and that the Petition for Certiorari should be granted, and full argument afforded for this denial by the Supreme Court of equal protection of the laws to the City of Miami.

Respectfully submitted,

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JOHN S. LLOYD,
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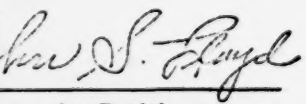
By 
Attorneys for Petitioner

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Of Counsel

CERTIFICATE OF SERVICE

I, JOHN S. LLOYD, Counsel for Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 1st day of Nov., 1973, I served a copy of the foregoing Petition for Writ of Certiorari on the Respondent by mailing a copy thereof in a duly addressed envelope to THEODORE M. TRUSHIN, Esq., 420 Lincoln Road, Miami Beach, Florida 33139.

ALAN H. ROTHSTEIN,
City Attorney
JOHN S. LLOYD,
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Miami, Florida 33130

By John S. Lloyd
Attorneys for Petitioner

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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EXHIBIT 1 — ORDER DENYING PETITION FOR REHEARING (dated October 3, 1973) ..... App. 1-2

EXHIBIT 2 — DECISION AND OPINION OF THE SUPREME COURT OF FLORIDA ON REHEARING GRANTED (dated June 27, 1973) ..... App. 3-10

EXHIBIT 3 — DECISION AND OPINION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT (dated August 8, 1972) ..... App. 11-14

EXHIBIT 4 — PETITION FOR REHEARING FILED ON BEHALF OF THE CITY OF MIAMI IN THE SUPREME COURT OF FLORIDA (dated July 10, 1973) ..... App. 15-21

EXHIBIT #1

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1973

WEDNESDAY, OCTOBER 3, 1973

CASE NO. 42,937

DAVID SPICY,

Petitioner,

vs.

CITY OF MIAMI, a municipal corporation,

Respondent.

[Filed October 5, 1973]

On consideration of the petition for rehearing filed by attorney for respondent, reply thereto and response to reply,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

ROBERTS, ERVIN, ADKINS, McCAIN and DEKLE, JJ., concur

CARLTON, C.J., and BOYD, J., dissent

Y
CC: Hon. Alan H. Rothstein
(Hon. John S. Lloyd,
Hon. Montague Rosenberg
Hon. R. Harris Turner)
Theodore M. Trushin Law Offices
(Hon. Michael B. Solomon)
Hon. W. P. Carter, Clerk

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

By: Kay D. Yent
Deputy Clerk

EXHIBIT #2

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

[TITLE OMITTED]

Opinion filed June 27, 1973

Writ of Certiorari to the District Court of Appeal, Third District

Michael B. Solomon of Theodore M. Trushin Law Offices, for Petitioner

Alan H. Rothstein, City Attorney and R. Harris Turner, Assistant City Attorney, for Respondent.

ON REHEARING GRANTED

DEKLE, J.

Conflict as a basis for review on certiorari became apparent upon a close consideration of the factual situation appearing on the face of the Third District Court's opinion at 266 So.2d 101 (1972), reversing a resolution of those facts by a jury. Our quashal of a similar substitution of factual judgment by the Third District in Westerman v. Shell's City, Inc., 265 So.2d 43 (Fla. 1972), and the holding in Golden Hills Turf and Country Club v. Buchanan, 273 So.2d 375 (Fla. 1973), are bases for conflict, affording jurisdiction under Fla. Const. art. V, § 3(b)(3)(1973).

Two City of Miami police officers during the course of their duties saw Alton Exson (petitioner's decedent) in the right front passenger side of a taxicab in a dazed, incoherent condition suffering from a head injury. There was blood on the back of his head, on the seat of the cab and the sidewalk. The police testified that at the scene (taxi) the deceased spoke "in a slow manner", did not answer coherently and his eyes were "glassy looking". "That's why I started asking his co-worker what's wrong with him." The officers did not detect any alcohol on his breath.

Decedent was transported to Jackson Memorial Hospital for an examination. The examining intern at the hospital stated that when he asked about drinking, Exson told him that he had earlier had "two drinks." The doctor "felt that he had been drinking to the extent that he had a staggering gait," although he conceded that neurological impairment to his legs from a blow on the head could also cause his staggering. The doctor had "no opinion as to whether or not he was drunk". "I can't say that he was." He recalls no conversation relaying his views to the police. Yet, the police based the required "substantial reason to believe the plaintiff was committing a misdemeanor"[1] (public drunkenness) upon the intern's later determination as to whether he was in fact drunk. This the officers cannot do. It is the officer's judgment that must be exercised. It is he who must support by his testimony the charge he makes. Here he admits that he cannot when he testifies:

"Q. You wrote up an arrest paper, you said?
A. Right, and an injury report.

[1]City of Miami v. Albro, 120 So.2d 23, 25 (Fla.App.3d 1960).

Q. What was the reason you wrote up both?
A. Well, the reason I wrote up both, because I was not able to determine his problem. I felt like he was injured, I felt like he possibly could have been drunk; I didn't know which one.

Q. You did not know which one at the time—
A. Actually.

* * *

"Q. Would it be a fair statement to say that after you waved goodbye to Mr. Exson leaving in the ambulance you left it entirely up to whatever doctor examined or was supposed to examine Mr. Exson regarding whether or not he was drunk?
A. Right.

* * *

"Q. Besides that, did he appear to be normal?
A. Drunk or injured.

Q. Drunk or injured?
A. Drunk or injured. His condition could have been from an injury or his condition could have been from some type of alcohol."

(Emphasis added)

The judge also questioned Officer Bowles concerning the substance of his testimony:

"THE COURT: He said he [officer] could not determine whether he was drunk or injured, so he said he left it up to the doctor.

> You tell me [doctor] if, from your examination this man is injured. If he is injured, release him. If he is drunk, you have my arrest slip. Put him in the jail.
>
> THE WITNESS [Bowles]: Yes.
>
> THE COURT: Am I telling it exactly as it was?
>
> THE WITNESS: Yes, sir, exactly like it was. That's the information that I sent to the hospital."

After the examination was completed at the hospital Exson was released to the Police Department and taken to jail. It never is clear as to his arrest.[2] The following day, his condition worsened, and he was returned to the hospital. A few days later, Exson died from multiple fractures of the skull and multiple contusions and lacerations.

---

[2] "Q What happened next?
"A So I requested the ambulance and I made two reports. I made the type of report that he would be admitted to the hospital and I made the type of report that he would be sent to the city jail if he was drunk. I gave the ambulance driver the two reports to give to the booking officer at the hospital. If this man was found, through the doctor, to be injured, then the arrest report could be torn up. If, through the doctor, he was found to be drunk, then he could be sent to the station.
"Q Then you, personally, did not take Mr. Exson to the hospital?
"A I sent him by ambulance.

* * *

"Q. Therefore, after you sent Mr. Exson in the ambulance you never saw him again; is that correct?
"A. I never saw him again.

* * *

"Q. Did you consider him under arrest at that moment?
"Q. Not necessarily, because I had to wait for the report on the doctor." (Emphasis added)

Exson's administrator, petitioner herein, sued the City of Miami, respondent herein, and others, under the survival statute,[3] for false imprisonment. The complaint alleged that the City by and through its police officers falsely imprisoned Exson and were thereby liable under the doctrine of respondeat superior.[4] Following a trial on the issues, the jury said the City falsely imprisoned Exson and awarded $5,000 damages.

The Third District's opinion

reversed the jury's verdict on the ground that "under the circumstances reasonable men could not differ that the police officer acted reasonably." In making this decision, the DCA cited City of Miami v. Albro, 120 S.2d 23 (Fla.App.3d 1960), as controlling precedent. In Albro, the district court said if the police officer has substantial reason to believe that the person was committing a misdemeanor, the officer can arrest him. Right. BUT — as we have pointed out herein — the officer and not an intern at a later time, must have the "substantial reason" and must "believe" from observation and evidence at the point of arrest that the person was then and there committing a misdemeanor in his presence.[5] The officer cannot base his arrest upon hearsay or a subsequent determination by a third person at a different point in time.

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[3]Fla. Stat. § 46.021.

[4]Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957).

[5]Fla. Stat. 901.15. Cf. State v. Perez, ___ So.2d ___ (Fla. 1973) (Opinion filed May 16, 1973).

The district court also said that "the courts cannot second guess the officer in the performance of his duty." The Third District is correct that those of us sitting on the Court cannot do so but this is not to say that a jury cannot, for indeed it is the jury which makes the factual determination of whether the officer was correct or not, where there are conflicting facts such as these, from which reasonable men could at least differ — from which in fact they would be hard put to find other than as they did in these circumstances. Indeed, the trial judge would have been well within his authority if he had directed a verdict for the plaintiff where it was so clear, and the officer admitted, that he did not know and could not determine at the scene whether the deceased was drunk or just injured; ergo, no "substantial reason". The unfortunate "drunk" might better have fallen into the hands of the Good Samaritan.[6]

The question is not one of whether or not the police acted reasonably in taking the deceased to a hospital when it was so apparent that he was injured. Of course they should have done so with all haste. It is rather a question of whether they had good cause at the time they found the deceased to place him under arrest and to imprison him. The subsequent visit to the hospital was merely an interlude over which the deceased had no control in view of his arrest and head injury, and in view of his being promptly dispatched to jail after the hospital examination and placed in a "drunk tank" there until it was necessary to return him to the hospital where he died

[6]St. Luke 10:33-34.

a few days later from massive hemorraging from multiple fractures of the skull.

The key time to be considered with respect to an arrest is that moment of arrest at the scene, as to whether there was then and there (not as thereafter may have been concluded) reasonable cause for arrest.[7] The fact was that there was no substantial reason at the scene really to know what was wrong with the unfortunate man at that point. The police officer testified three different times that he did not know at that juncture what was wrong with the man. The only subsequent event that could be related was a statement by the deceased upon inquiry by the doctor at the hospital, that he had two drinks earlier. This alone would not be a "substantial reason to believe that the person was committing a misdemeanor."

Police officers during their duties encounter persons in various conditions of sobriety and health so that they are charged with a degree of judgment of the ordinary police officer in such a situation in determining whether there is substantial reason to believe that the person involved is in the process of committing a misdemeanor, namely being drunk, and the officers here have said that they detected no odor of alcohol at the scene. It takes little imagination to understand the jury's conclusion that the officers did not act with substantial reason and to find in favor of the deceased's administrator.

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[7]See State v. Perez, So.2d (Fla. 1973) (Opinion filed May 16, 1973), quoting from Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972).

Petition for certiorari is granted, the district court's decision at 266 So.2d 101 (1972) is hereby quashed with instructions to remand the cause for reinstatement of the jury's verdict for the petitioner.

It is so ordered.

ROBERTS, ERVIN, ADKINS and McCAIN, JJ., Concur

CARLTON, C.J. and BOYD, J., Dissent

EXHIBIT #3

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT

JULY TERM, A.D. 1972

CASE NO. 71-1276

CITY OF MIAMI, a municipal corporation,

Appellant,

vs.

DAVID SPICY,

Appellee.

Opinion filed August 8, 1972.

An Appeal from the Circuit Court for Dade County, Milton A. Friedman, Judge.

Alan H. Rothstein, City Attorney, and Sidney B. Shapiro and R. Harris Turner, Assistant City Attorneys, for appellant.

Theodore M. Trushin and Michael B. Solomon, for appellee.

Before CHARLES CARROLL, HENDRY and HAVERFIELD, JJ.

HENDRY, Judge.

Appellee-defendant, the City of Miami, seeks review of a $5,000.00 judgment, entered pursuant to a jury verdict in that amount, in favor of appellee David Spicy, successor administrator of the estate of Alton Jimmie Exson, in an action for false imprisonment brought under the survival statute.

The first administrator filed suit against Dade County, the City of Miami, and a physician working at Jackson Memorial Hospital, which is operated by the County. The county and the physician entered into a settlement with the plaintiff, leaving the city as the only defendant. The city's motion for summary judgment was granted in part so that the issues became joined solely as to the allegations that the decedent was falsely imprisoned by a police officer, for which the city would be liable under the doctrine of respondent superior.

We express the view that City of Miami v. Albro, Fla.App.1960, 120 So.2d 23 is controlling, and that the evidence presented was insufficient to sustain the verdict of liability against the city.

On July 1, 1962, police officers found Alton Jimmie Exson in a dazed condition suffering from a head injury. The arresting officer testified that Exson acted drunk rather than injured, even though blood was on the seat of the taxicab and the sidewalk and the officer saw a cut at the back of Exson's head. The officer did not

detect any alcohol on his breath. The officer also explained that none of Exson's co-workers would take him home. Therefore, Exson was taken into custody and transported by ambulance to Jackson Memorial Hospital for an examination. The officer filled out both an examination report and an arrest report for drunkenness.

The physician at the hospital conducted an examination which revealed a small laceration in the back of his head and a negative neurological indication. While being examined, Exson admitted to the physician that he had been drinking.

After the examination was completed, Exson was released to the police department and was taken to jail. The next day, his condition worsened, and he was returned to Jackson Memorial Hospital. He died on July 19, 1962. The autopsy report showed that deceased suffered multiple fractures of the skull and multiple contusions and lacerations.

In the Albro case, supra, at p. 26, the court stated:

> "In considering the legality of an arrest by a municipal officer for a breach of the peace committed in his presence, the determining factor is not whether the charged person is actually guilty. The question to be determined is whether or not the officer had substantial reason to believe the plaintiff was committing a misdemeanor. If substantial reason exists the courts cannot second guess the officer in the performance of his duty. In the instant case the cause was not submitted to the jury upon the issue of

whether the officer used excessive force but on the issue of whether the plaintiff committed an offense."

The officer observed Exson in a dazed, incoherent condition with glassy eyes, and suffering from a cut. The officer described him as being drunk, even though he smelled no alcohol on Exson's breath, and placed him under arrest. The officer sent Exson to the hospital for examination, which examination disclosed no severe injuries and during which time Exson admitted drinking. Drunkenness, for which Exson was placed under arrest, was a misdemeanor under § 856.01, Fla.Stat. 1959 (which was identical to the present statute before its repeal by 1971 Laws of Florida, Ch. 71-132, § 17, to be effective July 1, 1973) and the predecessor municipal ordinance sections of the City of Miami Code §§ 38—13 and 38—50. Under the circumstances reasonable men could not differ that the police officer acted reasonably. Thus, the lower court erred in failing to direct a verdict for the defendant.

Therefore, the judgment appealed is reversed and remanded with directions to enter a verdict for the defendant city.

EXHIBIT #4

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 42,937

DAVID SPICY,

Petitioner,

vs.

CITY OF MIAMI, a municipal corporation,

Respondent.

PETITION FOR REHEARING

TO THE HONORABLE JUDGES OF THE SUPREME COURT OF FLORIDA:

Respondent, CITY OF MIAMI, a municipal corporation, by and through its undersigned counsel, files this its Petition for Rehearing respectfully requesting this Honorable Court to reconsider its decision and opinion filed on June 27, 1973 on rehearing granted, wherein this Court quashed the decision of the District Court of Appeal, Third District, at 266 So.2d 101 (1972) with instructions to remand the cause for reinstatement of the jury's verdict for the plaintiff.

As grounds for rehearing, respondent, CITY OF MIAMI, respectfully suggests the following:

I. The Court, in arriving at its decision, overlooked or failed to consider the following:

(a) The Supreme Court having granted certiorari considers the merits of the entire cause. This court has overlooked or failed to consider the merits of the entire cause in confining its opinion to the sole issue of false imprisonment. The subsequent paragraphs outline merits which have been overlooked or not considered.

(b) The trial court erred in holding that the administrator was a proper party to bring an action for wrongful death because the evidence at the trial demonstrated there was a widow to bring such action. In overlooking the aforesaid facet of the case, this Court has overlooked its own decision and opinion in the case of Love v. Hannah (Fla. 1954), 72 So.2d 39. In construing the wrongful death statute, Section 768.02, Florida Statutes, this Court held that the existence or non-existence of anyone having the precedent right of action under the statute enters into the very substance of the right of action itself when instituted by any of the named classes of persons after the first.

(c) The trial court erroneously refused to limit the area of damages to the damages sustained by the deceased in jail and erroneously allowed into evidence the fact of the death of the deceased which occurred in Jackson Memorial Hospital. In overlooking or failing to consider this point, this court overlooked the fact that damages awarded plaintiff were NOT proved to have been sustained from the direct result of the stay in jail of the deceased. See Cone v. Intercounty Telephone and Telegraph Company (Fla. 1949), 40 So.2d 148, as follows:

> "Conversely, when the loss is not a direct result of the negligent act complained of, or does not follow a natural ordinary sequence of such an act but is merely a possible, as distinguished from a natural and probable, result of the negligence, recovery will not be allowed."

(d) The trial court erred in not entering the judgment with set off as requested by defendant. In overlooking this point, this Court has failed to consider the requirements of Section 768.041(2), Florida Statutes, as follows:

> "At the trial if any defendant shows the court that the plaintiff or other person lawfully on his behalf has delivered a release or covenant not to sue to any person, firm or corporation in partial satisfaction of the damages sued for the court shall set off this amount from the amount of any judgment to which the plaintiff would be otherwise entitled at the time of rendering the judgment and enter judgment accordingly."

The amount paid by the doctor and the hospital in settlement should have been allowed to have been applied against the $5,000 judgment entered against the CITY OF MIAMI, as a set off.

(e) There was no evidence to indicate that the imprisonment of the deceased was the proximate cause of his death. The deceased was transferred from Jackson Memorial Hospital by Dr. Whaley without medical treatment. No evidence was adduced to show that the deceased at the time needed medical treatment, or would have or

could have sought such medical treatment if he had not been transferred to jail by Dr. Whaley.

(f) All of the above points were raised in the District Court of Appeal by the CITY OF MIAMI. It was not necessary for that court to consider them because that court held that the arrest of the deceased was proper.

This court, however, in holding that the arrest was unlawful, should then have proceeded to consider these other points which constitute the merits of the case which this court should consider having granted certiorari.

In summary, this Court has overlooked or failed to consider the following points:

(1) The administrator was not the proper party to bring an action for wrongful death because his own testimony indicated the existence of a common-law wife at a time when common-law marriage was lawful in Florida.

(2) The trial court erroneously refused to limit the area of damages only to those the deceased may have suffered during his stay in jail, because there was no evidence shown by either expert or other medical testimony that the death of the deceased resulted from any action the CITY OF MIAMI did or did not take.

(3) The Trial Court erroneously refused to enter a judgment with set off as requested by defendant, CITY OF MIAMI, because the sum received by the plaintiff from other defendants should have been applied in reduction of the judgment rendered against the CITY OF MIAMI by virtue of Section 768.041, Florida Statutes.

See also Thomas Air Conditioning & Refrigeration Co. v. Bankston (Fla. App. 1970) 231 So.2d 272.

II. In addition, this Court has violated the right of the CITY OF MIAMI to due process of law under the 14th Amendment to the U. S. Constitution by overlooking the fact that, by its decision, the Court has made the CITY OF MIAMI responsible for the negligence or fault of a third party.

False imprisonment, if any occurred, was committed by the previous defendant, Dr. Preston Whaley. It was Dr. Whaley who transferred the deceased from the Jackson Memorial Hospital to the Miami City Jail. If Dr. Whaley found that the deceased was neither drunk nor injured he should have simply released the deceased.

This court's own quotation of the evidence clearly shows that if there were false imprisonment the false imprisonment was the act of the previous defendant, Dr. Whaley, and not the arresting officer.

In Footnote 2 of this Court's opinion, the following testimony of the police officer is quoted:

> "A. . . . . If this man was found, through the doctor, to be injured, then the arrest report could be torn up. If, through the doctor, he was found to be drunk, then he could be sent to the station. . . . . I sent him by ambulance (to the hospital)."

In fact, all the police officer did was to send the deceased to the hospital by ambulance. The instruction

of the police officer was to send the deceased to the station if he was found to be drunk. Obviously, if he was not found to be drunk he should have either been kept in the hospital or released.

Thus, the Court, in overlooking the fact that the false arrest, if any, was committed by Dr. Preston Whaley and not by the officer employed by the CITY OF MIAMI, the Court has denied the CITY OF MIAMI due process of law under the 14th Amendment to the U. S. Constitution by making the CITY OF MIAMI responsible for the fault of another not employed or connected with the CITY OF MIAMI in any fashion.

III. This Court has further failed to consider that its decision and opinion has denied to individual police officers in Florida, as well as the CITY OF MIAMI, equal protection of the laws and due process of law guaranteed by the U. S. Constitution because the opinion makes police officers responsible for a standard of care which is impossible to perform by requiring the following of police officers:

(1) Each police officer making an arrest to be a judge of possible latent medical problems;

(2) Police officers are the guarantors of the life, health and medical safety of arrested persons who may later have medical problems.

WHEREFORE, respondent, CITY OF MIAMI, prays that a rehearing be granted so that this court may consider the merits of this cause, and the constitutionality of its opinion as it stands.

I HEREBY CERTIFY that a true copy of the foregoing Petition for Rehearing was mailed to THEODORE M. TRUSHIN LAW OFFICES, Attorney for Petitioner, 420 Lincoln Road, Miami Beach, Florida, this 10th day of July, 1973.

ALAN H. ROTHSTEIN,
City Attorney
JOHN S. LLOYD,
Asst. City Atty.
MONTAGUE ROSENBERG,
Asst. City Atty.
65 S. W. 1st Street, Miami, Florida

/s/ Montague Rosenberg
By _____
Montague Rosenberg
Attorney for Respondent

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In the Supreme Court of the United States

October Term, 1973

No. 73-728

CITY OF MIAMI, a municipal corporation,

Petitioner,

vs.

DAVID SPICY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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MIAMI REVIEW — 371-4853 — 377-3721

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BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTION

I.

NO FEDERAL GROUNDS WERE TIMELY RAISED AND, THEREFORE, THE DECISION DID NOT PASS ON ANY.

The Respondent respectfully submits that the City has failed to invoke the jurisdiction of this Court pursuant to Title 28, U.S. Code, §1257 (3). The City claims that the Supreme Court of Florida, by its Opinion, denied due process and equal protection of the law to it by holding the City liable for the torts of another, to wit, Jackson Memorial Hospital. The City has, pursuant to Rule 23(1)(f) of this Court, specified the stage of the proceedings in the court of first instance and in the appellate court, and the manner in which the federal questions sought to be reviewed were raised. The Respondent notes that the City states in its Petition as follows:

> "The contention was raised in this Petition for Rehearing that the Supreme Court of Florida violated the right of the City of Miami to due process of law under the 14th Amendment to the United States Constitution by making the City of Miami responsible for the negligence or fault of a third party." (Petition pp. 4-5)

In other words, the City raised the "federal question" for the first time upon the Petition for Rehearing to the Florida Supreme Court. The Florida Supreme Court, by its Order denying Petition for Rehearing, filed October 5, 1973, per curiam denied said Petition. (App. 1) This Court

has held that the raising of a federal question for the first time in a petition for rehearing addressed to the highest state court is not sufficient to invoke this Court's jurisdiction if the state court does not entertain the Petition or expressly decide the question. *Radio Station W.O.W. v. Johnson*, 326 U.S. 120, 128; *Hanson v. Denckla* 357 U.S. 235, 243-4; *Herndon v. Georgia*, 295 U.S. 441, 443; *American Surety Co., v. Baldwin*, 287 U.S. 156; *Forbes v. State Council*, 216 U.S. 396; *Simmerman v. Nebraska*, 116 U.S. 54.

It cannot be argued that this is a situation where the federal question was raised upon Petition for Rehearing because the Petitioner was surprised or was given no proper opportunity to anticipate or assert the particular federal question. The Supreme Court of Florida, after initially denying Respondent's Petition for Certiorari before that Court, upon Petition for Rehearing, entered its Order Granting Rehearing And Allowing Certiorari on March 28, 1973. The Court ordered both the City and Respondent to file briefs on the merits pursuant to Rule 4.5c(6), Florida Appellate Rules. (R. App. 1) Briefs were submitted wherein the merits of the cause were strenuously argued. The situation, the facts, the testimony, and the law were all the same at the initial stages of this litigation, through the trial, through the initial appeal to the intermediate state court by the City herein, and all was argued fully in the Briefs on the merits. The City only raised the supposed issue of deprivation of due process of law under the 14th Amendment to the United States Constitution, as admitted, for the first time in its Petition for Rehearing (App. 15-21) filed *after* the Opinion of the Florida Supreme Court to which the Petition for Writ of Certiorari herein is directed. The Florida Supreme Court, in its Opinion,

raised no surprises, or indeed any constitutional issues in its Opinion. It merely reinstated the trial court's finding of false imprisonment because the arresting officer did not have probable cause to arrest. Therefore, the City was not surprised at anything in this Opinion since this had been the trial court's original finding. In addition, the supposed "federal question" was never asserted in the appeal to the intermediate State Court as an examination of the City's Assignments of Error (R. App. 2-3) will reveal. By those Assignments of Error the City sought to review the very same decision upon the very same facts that the Supreme Court of Florida later reinstated. It is the City's burden to demonstrate that the decision of the Florida Supreme Court was a surprise and could not have been reasonably anticipated from prior decisions. *Herndon v. Georgia*, 295 U.S. 441. This it cannot do. It is bound to anticipate the probability of pertinent past decisions being applied by the court sought to be reviewed, as was done in the instant case, and if the result is thereby foreshadowed, it cannot claim surprise.

Since the Opinion of the Florida Supreme Court sought to be reviewed here contains no substantial constitutional questions raised, argued or disposed of by the Florida Supreme Court, and since the asserted "federal question" sought to be relied upon here for jurisdiction was not raised until a Petition for Rehearing which was not entertained or specifically ruled upon by the Florida Supreme Court, this Court has no jurisdiction to determine the constitutionality of any decision since none involving any "federal question" was disposed of by the Florida Supreme Court.

II.

THE DECISION SOUGHT TO BE REVIEWED RESTS UPON ENTIRELY NON FEDERAL GROUNDS.

The Respondent points out in addition that the Florida Supreme Court in its Opinion did not have to, nor did it, arrive at its decision by the disposition of a federal question. Instead, its decision was reached for "non-federal" reasons. The majority Opinion, sought to be reviewed, must explicitly or impliedly recognize the presence of the federal question and render a decision thereon. This Court has long and consistantly adhered to the principle that it will not review a state court judgment based upon an adequate and independent non-federal ground. *Murdock v. Memphis*, 20; Wall. 590, 636; *Berea College v. Kentucky*, 211 U.S. 45, 53; *Fox Film Corp. v. Muller*, 296 U.S. 207. This is true even though a federal question be involved and perhaps improperly decided by the state court, which is not the situation in the instant case. A reading of the Opinion of the Florida Supreme Court clearly reveals that its decision was based upon two factors;

1. A review of the facts which demonstrated that the arresting officer did not have, himself, probable cause for arrest, and

2. That the intermediate court was incorrect in substituting its appellate judgment for that of the trier of fact.

Based upon this, it can easily be seen that the Florida Supreme Court's Opinion was based upon non-federal grounds, and that these non-federal grounds were adequate to support the judgment. Not only were there adequate grounds upon which to support it, but it was based upon the only grounds involved in the issues before the trial court, the intermediate reviewing court, and the Florida Supreme Court; issues which involved only non-federal questions.

Essentially, while it is recognized that this Court is the arbiter of whether or not the non-federal grounds set forth in the Opinion sought to be reviewed are adequate to support the judgment without consideration of any federal question, (in this case not even raised) there are certain criteria that are employed. These are; the non-federal ground must be broad enough, without considering a federal question, to sustain a judgment, the non-federal grounds must be independent of any federal question, and the non-federal grounds upon which the judgment is based must be tenable. A review of the facts contained within the Opinion of the Florida Supreme Court (App. 3-10) clearly indicate, as set forth *supra*, that the questions presented and decided by the Florida Supreme Court were factual in nature, based upon the testimony, and that these were the only questions involved in the proceedings leading to the Opinion of the Florida Supreme Court.

QUESTION PRESENTED

WHETHER OR NOT THE PETITIONER WAS DENIED ANY CONSTITUTIONAL RIGHT WHICH INVOLVED AN IMPORTANT FEDERAL QUESTION, AND WHETHER OR NOT THIS FEDERAL QUESTION WAS TIMELY PRESENTED TO THE FLORIDA SUPREME COURT SO THAT IT WAS ABLE TO SPECIFICALLY DISPOSE OF SAME.

STATEMENT OF THE CASE

The Respondent is not obliged to accept the Statement of the Case of the proceedings below as set forth in the Petition in that it is misleading and is in factual divergence with the Opinion sought to be reviewed herein. This Statement also impliedly mis-states some of the facts and slants them to a position in accordance with the arguments contained in the Petition. Therefore, the Respondent respectfully submits certain relevant portions of the Opinion of the Florida Supreme Court sought to be reviewed here and adopts same as its Statement of the Case:

> "Two City of Miami police officers during the course of their duties saw Alton Exson (petitioner's decedent) in the right front passenger side of a taxi-cab in a dazed, incoherent condition suffering from a head injury. There was blood on the back of his head, on the seat of the cab and the sidewalk. The police testified that at the scene (taxi) the deceased spoke 'in a slow manner', did not answer coherently and his eyes were 'glassy looking'. 'That's why I started asking his

co-worker what's wrong with him.' The officers did not detect any alcohol on his breath.

Decedent was transported to Jackson Memorial Hospital for an examination. The examining intern at the hospital stated that when he asked about drinking, Exson told him that he had earlier had 'two drinks.' The doctor 'felt that he had been drinking to the extent that he had a staggering gait,' although he conceded that neurological impairment to his legs from a blow on the head could cause his staggering. The doctor had 'no opinion as to whether or not he was drunk'. 'I can't say that he was.' He recalls no conversation relaying his views to the police." (App. 4).

The Supreme Court of Florida also set forth certain of the testimony as to what then transpired, including questions of the trial judge:

'Q. You wrote up an arrest paper, you said?
A. Right, and an injury report.

Q. What was the reason you wrote up both?
A. Well, the reason I wrote up both, because I was not able to determine his problem. I felt like he was injured, I felt like he possibly could have been drunk; I didn't know which one.

Q. You did not know which one at the time—
A. Actually.

* * *

'Q. Would it be a fair statement to say that after you waved goodbye to Mr. Exson leaving in

the ambulance you left it entirely up to whatever doctor examined or was suppose to examine Mr. Exson regarding whether or not he was drunk?
A. Right.

* * *

'Q. Besides that, did he appear to be normal?
A. Drunk or injured.

Q. Drunk or injured?
A. Drunk or injured. His condition could have been from an injury or his condition could have been from some type of alcohol." (Emphasis added)

'THE COURT: He said he [officer] could not determine whether he was drunk or injured, so he said he left it up to the doctor. You tell me [doctor] if, from your examination this man is injured. If he is injured, release him. If he is drunk, you have my arrest slip. Put him in the jail.

THE WITNESS: [Bowles]: Yes.

THE COURT: Am I telling it exactly as it was?

THE WITNESS: Yes, sir, exactly like it was. That's the information that I sent to the hospital.' (App. 4-6).

The court went on:

"After the examination was completed at the hospital Exson was released to the Police Department and taken to jail. It never is clear as

to his arrest. The following day, his condition worsened, and he was returned to the hospital. A few days later, Exson died from multiple fractures of the skull and multiple contusions and lacerations.

Exson's administrator, petitioner herein, sued the City of Miami, respondent herein, and others under the survival statute, for false imprisonment. The complaint alleged that the City by and through its police officers falsely imprisoned Exson and were thereby liable under the doctrine of respondent superior. Following a trial on the issues, the jury said the City falsely imprisoned Exson and awarded $5,000 damages." (App. 6-7).

Respondent accepts the balance of the Statement of the Case found in the Petition.

ARGUMENT

I.

THIS COURT SHOULD NOT RECONSIDER FACTUAL MATTERS DECIDED BELOW.

Although the Respondent will consider the factual questions raised in the City's Petition as they relate to the jurisdiction of this Court, it is appropriate here to first discuss the applicable rulings of this Court as they relate to its abstinence from making decisions which would review state court findings of fact. As will be shortly discussed, the major point that the City seems to be trying

to make in its Petition is that the police officers are not to be lay judges of an arrestee's physical condition as it may relate to whether or not the officer had substantial reason to believe the arrestee was committing a misdemeanor. Therefore, the City goes on, the police officer should not be held responsible for what thereafter transpired after the arrest was made with regard to any damages that may befall the arrestee after he was placed under arrest, even if furthered by the negligence of others. The Supreme Court of Florida had made, in its Opinion, its decision regarding both of these factual matters. In effect, it said, first, that the facts as revealed by the testimony at the trial were such as to clearly and unequivocably establish that the arresting officer in the instant case did not have substantial reason to believe that his arrestee was committing a misdemeanor, in spite of his lack of knowledge as to the arrestee's condition as to physical infirmities. Second, it said that it was not the police officer's dispatching of the arrestee to the hospital that was improper, but it was the factor that he was also under arrest at this time. The Court said, "The subsequent visit to the hospital was merely an interlude over which the deceased had no control in view of his arrest and head injury, and in view of his being promptly dispatched to jail after the hospital examination and placed in a 'drunk tank' there until it was necessary to return him to the hospital where he died a few days later from massive hemorrhaging from multiple fractures of the skull." (App. 8-9) What the court was saying here was clear: That *but for* the *arrest* of the decedent, he would not have been thrown in the drunk tank after visiting the hospital, and his injuries, within the realm of reasonable probability, would not have befallen him and he would not have died.

All of the above matters set forth by the Florida Supreme Court were clearly factual matters. In addition, it held that the intermediate reviewing state court had substituted its judgment on these matters for that of the trier of fact, in reversing, and that this was improper. The City, in its Petition (at page 5), in effect asks this Court to review the standards by which the police officer may be held for his lack of wisdom in making an arrest and, whether the lack of wisdom displayed in this case was the proximate cause of the arrestee's damage, for which the verdict was rendered. This the Court should not do. *Grayson v. Harris*, 267 U.S. 352, 358. This is not a case where any federal right is intermingled with a factual situation, as has been shown. Even if a federal right was involved, as has been set forth, this federal right was never timely raised, so as to make it an issue in the controversy which resulted in the Florida Supreme Court's Opinion. Since this Court has no jurisdiction to resolve factual issues already resolved by the Florida Supreme Court, and since this is what the City seeks this Court to do, jurisdiction will not lie to issue the Writ of Certiorari sought.

It would be necessary for this Court to examine the facts in this case to even consider the City's arguments. This Court has indicated that it does not review evidence and discuss factual situations. *United States v. Johnston*, 268 U.S. 220, 227.

II.

THE DECISION BELOW IS CLEARLY CORRECT.

This portion of this Argument shall deal with the initial thrust of the City's Argument contained in its Petition. At this juncture, it should be pointed out that the City's Petition for Writ of Certiorari fails to include the section on The Reasons for Granting the Writ pursuant to this Court's Rules 23(1)(h) and 19. In spite of this, the City seems to point out that this Court's jurisdiction should be invoked to consider the City's asserted point that it was denied due process of law under the Fourteenth Amendment to the United States Constitution by making it responsible for the negligence or fault of a third party; in this case, the hospital facility and its employees. The City contends that any false imprisonment was committed by the hospital intern "who transferred the Deceased from the hospital to the jail." (Petition, page 5.) The rejoinder to this point is clearly set forth in the Supreme Court of Florida's Opinion where it pointed out:

> "The subsequent visit to the hospital was merely an interlude over which the deceased had no control in view of his arrest and head injury, and in view of his being promptly dispatched to jail after the hospital examination and placed in a 'drunk tank' . . ." (App. 8).

In other words, the force and effect of the initial arrest slip written out by the police officer at the place of arrest continued to govern whether or not the deceased would be dispatched to jail after the examination at the hospital.

If he had not been arrested, he would have not been dispatched to the "drunk tank." Therefore, the contention that the false imprisonment was committed by the hospital intern is without merit since he would have no power to have so committed the deceased to the "drunk tank" where his injuries either originated or were compounded *but for* the arresting officer writing up his arrest slip. (App. 4-5).

In attempting to establish a "federal question," as set forth above, the City next attempts to place the blame upon the intern at the hospital facility by stating that if the intern found the deceased neither drunk nor injured, he should have released the decedent. This point should be discussed with the City's last argument that the police officer merely sent the deceased to the hospital with instructions to send him to jail if he was found to be drunk. In this manner, the City attempts to place the onus upon the intern for making a decision which the police officer was obliged to make himself before he arrested the decedent. An arresting officer cannot delegate away his responsibility to have substantial reason to believe a person is committing a misdemeanor before he arrests him. This was recognized by the Supreme Court of Florida and discussed at length. (App. 4-6, 7-9). The Opinion quoted a recent decision of that panel, *State v. Perez*, 277 So.2d 778 (Fla. 1973), which in turn quoted from this Court's Opinion in *Adams v. Williams*, 407 U.S. 143. The thrust of these two decisions is that, applied to this case, it was grossly improper to have delegated the responsibility to determine "substantial reason" for arrest to a third party. This thus disposes of the City's argument which attempts to place the blame on the intern at the hospital facility for a tort that was set in motion and continued to its ultimate result by the servants of the City.

The City also argues that the Florida Supreme Court set unreasonable and impossible standards of care upon the police officers in making arrests by its ruling in the factual situation outlined in the Opinion. It goes on to assert that the Florida Supreme Court, by its Opinion, requires the police to be judges of possible medical problems and guarantors to life, health and medical safety of arrested persons. This could not be further from the truth. What the Florida Supreme Court clearly set forth in its Opinion was that there must be some basis in fact upon which an arrest might be made before it is made. Knowledge or lack of knowledge of medical problems, latent or no, add or detract nothing from the facts necessary to determine if there is substantial reason to believe someone is committing a misdemeanor. That the police officer was unable to determine if the deceased was injured had nothing to do with his primary responsibility of first determining whether or not he committed a violation of law. As the Florida Supreme Court's Opinion clearly set forth, he did not discharge this duty. The situation is akin to arresting someone, for instance, with a serious heart condition for murder. The heart condition has nothing to do with the culpability of the arrestee. The police, of course, must have reasonable grounds to believe that the arrestee had in fact committed the murder before they could arrest him. If they did not, and the subsequent incarceration proved fatal, and it could be proved that but for the incarceration the victim would not have died, the arresting authority would be liable for false imprisonment. This is the instant case, merely restated.

In response to the cases cited in the City's Petition, which state, in substance, that police officers are not expected to have a complete knowledge of the intricacies of

case law, but are merely expected to act reasonably in making an arrest, the words of the Florida Supreme Court in the instant case, setting forth the factual conclusions necessary, need only to be repeated here:

> "The key time to be considered with respect to an arrest is that moment of arrest at the scene, as to whether there was then and there (not as thereafter may have been concluded) reasonable cause for arrest.[7] The fact was that there was no substantial reason at the scene really to know what was wrong with the unfortunate man at that point. The police officer testified three different times that he did not know at that juncture what was wrong with the man. The only subsequent event that could be related was by the deceased upon inquiry by the doctor at the hospital, that he had two drinks earlier. This alone would not be a 'substantial reason to believe that the person was committing a misdemeanor.'
>
> "Police officers during their duties encounter persons in various conditions of sobriety and health so that they are charged with a degree of judgment of the ordinary police officer in such a situation in determining whether there is substantial reason to believe that the person involved is in the process of committing a misdemeanor,

[7]See State v. Perez, So.2d (Fla. 1973) (Opinion filed May 16, 1973), quoting from Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972).

namely being drunk, and the officers here have said that they detected no odor of alcohol at the scene. It takes little imagination to understand the jury's conclusion that the officers did not act with substantial reason and to find in favor of the deceased's administrator." (App. 9)

III.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

A careful examination of the City's Petition strangely leaves one question unanswered. That is, why should this Court exercise its jurisdiction? That the jurisdictional requirements have clearly not been met for the reasons set forth previously herein is clear. But in spite of this, is there any federal question at all that needs to be answered by a review of this case? That the situation is unique is not enough. It is unquestioned that the police officer in this case acted in an unusual manner in allowing someone else who was not a police officer to determine at a distant point in time after the arrest whether or not there was "substantial reason" to have arrested the decedent in the first place. It is this very bizarre set of facts presented in the instant case which belies the City's argument that there is a substantial federal question here. The decision in this case would serve as no guide to others, and would not settle a matter that was occurring frequently in this country. The City has cited this Court to no other instances where similar factual situations have put law enforcement officials in an untenable position. Thankfully, it appears that the situation presented here, occurring over

ten years ago, while not unique, is certainly of an extremely unusual nature. Today, police officers, as they are supposed to, make their own investigation as to probable cause before an arrest takes place. The situation described in the Statement of the Case is not police routine, nor is it common practice. It is limited to the facts in the instant case. Therefore, no ruling of this Court would be of any value as a precedent to others, and this Court for that reason, in addition, should not consider the case since no important federal question is raised here. The question raised was solely one of the City's liability for one "indiscretion" occurring a long time ago.

As was pointed out before, at least impliedly, the City seemed to be missing the point of the entire Opinion of the Florida Supreme Court in this case. It seems to think that the police officer acted in a proper manner in effecting the arrest. This the Supreme Court of Florida rejected. Due process of law means an opportunity to be heard, to present witnesses and cross-examine, and to be judged, in this case, by a jury of one's peers. The City had the benefit of due process of law in this case from the earliest stages of this proceeding, through the intermediate court of appeal, and finally to full review by the Florida Supreme Court. For it to allege that due process of law was violated by the Supreme Court of Florida's decision is to be almost laughable. It had access to three different courts and the full opportunity to argue its position that it was not liable for what happened to the decedent. The jury and the Supreme Court of Florida found to the contrary. Hence, due process of law was not denied to the City; the decision merely went against it. If the City's position here was tenable, in every case where there was vicarious liability or where the issue was one of liability for all dam-

age, even when not directly caused by the tortfeasor, the aggrieved party would be claiming deprivation of due process of law under the Fourteenth Amendment to the United States Constitution. This is not what due process is. There could not have been more "due process' than in the instant case which resulted in the ultimately correct decision after a decision on the merits which was exhaustively reviewed thereafter.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

THEODORE M. TRUSHIN
420 Lincoln Road Mall, Suite 600
Miami Beach, Florida 33139

BY: Theodore M. Trushin
Counsel for Respondent

November 28, 1973.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1973
WEDNESDAY, MARCH 28, 1973

CASE NO. 42,937

DAVID SPICY,

Petitioner,

vs.

CITY OF MIAMI, a municipal corporation,

Respondent.

ORDER GRANTING REHEARING AND ALLOWING CERTIORARI

The petition for rehearing is granted and the Clerk is directed to issue the Writ and set the cause down for oral argument.

The Petition herein for a Writ of Certiorari to the District Court of Appeal, Third District of Florida, is granted and the cause is hereby set down for oral argument at 9:30 o'clock a.m. Tuesday, May 15, 1973. A maximum of fifteen (15) minutes to the side is allowed but counsel is expected to use only so much of that time as is necessary.

The Court has tentatively accepted jurisdiction of this case; however, the parties should be prepared to argue the jurisdictional issue should the question be raised by the Court.

The time for filing briefs on the merits is set forth in Rule 4.5c(6), F.A.R.

ROBERTS, ERVIN, McCAIN and DEKLE, JJ., concur

CARLTON, C.J., ADKINS and BOYD, JJ., dissent

A True Copy

TEST:

/s/ Sid J. White

Sid J. White
Clerk Supreme Court.

By: Sara Gainey, D.C.

cc: Honorable William P. Carter
Theodore M. Trushin Law Offices
Honorable R. Harris Turner

ASSIGNMENTS OF ERROR

1. The verdict on liability is contrary to the law.

2. The verdict on liability is contrary to the evidence.

3. The verdict on liability is contrary to the law and the evidence.

4. The verdict on liability is contrary to the manifest weight of the evidence.

5. The verdict on damages is contrary to the law.

(a) The award of $5,000.00 is excessive. The issue should have been limited to damages suffered by deceased as a result of his stay in jail. Deceased remained in jail overnight. There is no evidence that he suffered any pain as a result. There is no evidence of loss of reputation. There is no evidence of humiliation. Thus, the award is based upon pure speculation or upon an improper consideration by the jury of the death of the deceased.

6. The verdict on damages is contrary to the evidence.

7. The verdict on damages is contrary to the law and the evidence.

8. The verdict on damages is contrary to the manifest weight of the evidence.

9. The court erred in refusing to grant the motion for mistrial made by counsel for defendant immediately following a remark by counsel for the plaintiff to the effect that the defendants, Jackson Memorial Hospital and Dr. Preston Whaley were no longer in the case.

Section 768.041(3), Florida Statutes, on the subject of a release or covenant not to sue, states as follows:

> "The fact of such a release or covenant not to sue or that any defendant has been dismissed by order of the court, shall not be made known to the jury." See Hertz Corporation v. Hellens, Fla. App. 1962, 140 So.2d 73, City of Coral Gables v. Jordan, Fla.App. 1966, 186 So.2d 60, 62, 191 So.2d 38.

10. The court erred in determining that Dr. Preston Whaley was an adverse witness.

11. The court erred in determining that officer M. C. Bowles was an adverse witness.

12. The court erred in failing to grant the motion for directed verdict made on behalf of the defendant at the close of the plaintiff's case on liability.

13. The court erred in failing to grant defendant's motion for directed verdict made at the cloclusion of all the evidence on liability.

14. The court erred in admitting into evidence the head slip issued by Dr. Whaley.

15. The court erred in allowing the witness, Anderson Johnson, to testify inasmuch as the name of this witness was not included in the list of witnesses furnished to defendant by plaintiff pursuant to the order of the court.

16. The court erred in allowing the medical records custodian for Jackson Memorial Hospital to testify inasmuch as the name of this witness was not included in the list of witnesses furnished to defendant by plaintiff pursuant to the order of the court.

17. The court erred in admitting into evidence the records of Jackson Memorial Hospital.

18. The court erred in admitting into evidence the autopsy report of Dr. Loynaz.

19. The court erred in allowing into evidence the mortality tables.

20. The court erred in failing to grant defendant's motion for directed verdict on damages made at the conclusion of plaintiff's case on damages.

21. The court erred in refusing to admit into evidence a document certified by the Clerk of the Municipal Court of the defendant containing the arrest record of the deceased.

22. The court erred in refusing to limit the issue of damages to any damage suffered by the deceased during the time he spent in jail.

23. The court erred in instructing the jury regarding aggravation of an alleged existing physical condition of the decedent.

24. The court erred in instructing the jury that the death of the deceased could be considered as an element of damages.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Brief for Respondent in Opposition to Petition for Writ of Certiorari to the Supreme Court of Florida was mailed to John S. Lloyd, City Attorney, and Montague Rosenberg, Assistant City Attorney, at 65 S.W. First Street, Miami, Florida 33130, this 6th day of December, 1973.

THEODORE M. TRUSHIN
420 Lincoln Road Mall, Suite 600
Miami Beach, Florida 33139

BY Theodore M. Trushin
THEODORE M. TRUSHIN

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FILED
JAN 28 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

CASE NO. 73-728

CITY OF MIAMI, a Municipal corporation,
Petitioner,

vs.

DAVID SPICY,
Respondent.

PETITION FOR REHEARING

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MIAMI REVIEW — 371-4853 — 377-3721

In the Supreme Court of the United States

CASE NO. 73-728

CITY OF MIAMI, a Municipal corporation,
Petitioner,

vs.

DAVID SPICY,
Respondent.

PETITION FOR REHEARING

The CITY OF MIAMI, Petitioner herein, files this its Petition for Rehearing on the following grounds:

1. This Court has inadvertently overlooked the fact that the Florida Supreme Court has denied it due process of law and equal protection of the law guaranteed to it by the United States Constitution by its decision denying rehearing holding the City of Miami legally liable for the tort of a third party, i.e. a Dade County hospital facility

which is a separate entity and in no wise connected with the City of Miami.

2. The Court has inadvertently overlooked the fact that the denial of certiorari herein deprives the City of Miami of property without due process of law.

3. This Court has inadvertently overlooked that fact, and expressly overruled without mentioning it, its decision in *Pierson v. Ray*, 386 U.S. 549, 18 L.Ed. 2d 288, 87 S.Ct. 1213, holding that good faith and probable cause is a defense available to the City of Miami herein.

4. This Court has inadvertently overlooked the respected Federal holding summarized in *Hill v. Rowlin*, 474 F. 2d 1374, holding that the test for making an arrest without a warrant is the subjective test of the reasonable good faith of the arresting officer.

5. This Court has inadvertently overlooked that the arresting officer exercised his judgment in good faith and under *Miami v. Albro*, 120 So. 2d 23, and *Pierson v. Ray*, supra, the City of Miami is immune from liability in the instant cause.

6. This Court has inadvertently overlooked the fact that it has reversed without mentioning it, *Cambist Films, Inc. v. Duggan*, 475 F. 2d 887, where the Court held:

> "Police officers are not expected to have a complete knowledge of the intricacies of case law rather they are only expected to act in accordance with the facts and circumstances of the given situation with which they are confronted."

7. This Court has inadvertently overlooked the fact that its denial of certiorari expressly overrules without mentioning it *Pierson v. Ray*, supra.

WHEREFORE, your Petitioner prays for a rehearing herein and to grant it oral argument thereon.

JOHN S. LLOYD,
City Attorney
MONTAGUE ROSENBERG,
Asst. City Attorney
Attorneys for Petitioner,
CITY OF MIAMI
65 S. W. First Street
Miami, Florida 33130

By /s/ Montague Rosenberg

Montague Rosenberg,
Asst. City Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Rehearing was mailed to THEODORE M. TRUSHIN LAW OFFICES, Attorney for Respondent, 420 Lincoln Road, Miami Beach, Florida 33139, this 15th day of January, 1974.

By /s/ Montague Rosenberg

Montague Rosenberg
Assistant City Attorney